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In the Supreme Court of the United States

OCTOBER TERM, 1996

LOON MOUNTAIN RECREATION CORPORATION,
PETITIONER

v.

ROLAND C. DUBOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the operation of a snowmaking system for a ski resort wherein water is transferred from one water body of the United States to another results in a discharge of pollutants that is subject to the permit requirements of Section 402 of the Clean Water Act, 33 U.S.C. 1342.

2. Whether, in assessing the environmental impacts of an expanded snowmaking system of a ski resort, the Forest Service violated the requirements of the National Environmental Policy Act, 42 U.S.C. 4321, by failing to evaluate the use of artificial water storage ponds as an alternative to drawing water from a natural body of water.

3. Whether the Forest Service was required to supplement its draft Environmental Impact Statement to solicit comment on its preferred alternative, where the preferred alternative identified in the Final Environmental Impact Statement was a composite of elements of other alternatives that had been analyzed in the draft Environmental Impact Statement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 102 F.3d 1273. The memorandum and order of the district court (Pet. App. 62a-102a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1996. Petitions for rehearing were disposed of on February 13, 1997. Pet. App. 60a-61a. The petition for a writ of certiorari was filed on March 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates the Loon Mountain Ski Area in the White Mountain National Forest, near the town of Lincoln, New Hampshire, pursuant to the terms of a special use permit issued by the Forest Service pursuant to the National Forest Service Ski Area Permit Act, 16 U.S.C. 497(b). See 36 C.F.R. 251.50-251.65. Petitioner's original permit allowed use of 785 acres of national forest land, and authorized a snowmaking system that utilized water from three water bodies: the East Branch of the Pemigewasset River, Boyle Brook, and Loon Pond. Pet. App. 4a-6a. Loon Pond is drained by Loon Pond Brook, which in turn feeds a municipal reservoir below Loon Pond before emptying into the East Branch. Gov't C.A. Br. 9. A 1974 agreement between petitioner and the Town of Lincoln authorized petitioner to pump snowmaking water from Loon Pond down to 18 inches below full level. In 1988, that agreement was amended to authorize snowmaking drawdowns below the 18-inch level on a case-by-case basis. Pet. App. 5a.

In 1986, petitioner applied to the Forest Service for an amendment to its special use permit to allow expansion of its facilities. Pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, the Forest Service in 1989 published a Draft Environmental Impact Statement (DEIS) and a supplement to that draft. Responding to criticisms of those documents, the Forest Service in 1991 issued a revised draft (RDEIS) that set forth five alternatives to meet the perceived increase in demand for use of the ski resort. Pet. App. 5a-6a; Gov't C.A. Br. 9-10. The alternatives ranged from no expansion of the resort to a 930-acre expansion, with improvements

designed to accommodate 7600 additional skiers per day, that would require 193 million gallons of water annually for snowmaking. Each alternative was assessed with respect to a wide range of environmental effects, including effects on soils, air quality, water resources, vegetation, and wildlife. Gov't C.A. Br. 10-11.

Following public comment on the RDEIS, the Forest Service issued a Final Environmental Impact Statement (FEIS) in November 1992. Pet. App. 7a; Gov't C.A. Br. 10. The FEIS identified a new Alternative 6 as the preferred alternative. Alternative 6 provided for the expansion of petitioner's resort to accommodate 3200 additional skiers per day by increasing petitioner's permit area by 581 acres and authorizing the construction of one new lift and approximately 70 acres of new ski trails in the new area. Under Alternative 6, petitioner's water use for snowmaking would double, from 67 to 138 million gallons (mgl), with the additional water coming from the East Branch and Loon Pond. Alternative 6 limited drawdowns of Loon Pond for snowmaking purposes to 15 feet, with an additional 5 feet of accessible water to be held in reserve for the Town of Lincoln. Gov't C.A. Br. 11.

To prevent any adverse effects on Loon Pond from the larger transfers of waters associated with petitioner's proposed expansion project, Alternative 6 required daily monitoring of water levels and water quality and required petitioner to pump water from the East Branch to Loon Pond in December and May of each year if Loon Pond was not otherwise full at those times. Pet. App. 7a-8a; Gov't C.A. Br. 11. Alternative 6 also restricted the transfer of East Branch

water to Loon Pond if it exceeded certain levels of turbidity, bacteria, oil or grease. *Id.* at 8a.

In March 1993, the Forest Service published a record of decision (ROD) that adopted Alternative 6. Respondents Roland C. Dubois and RESTORE: The North Woods (RESTORE) appealed the ROD to the Regional Forester and, thereafter, to the Chief of the Forest Service. Both appeals were denied. On March 16, 1994, the Forest Service issued a special use permit to petitioner. Pet. App. 8a-9a.

2. On June 13, 1994, Dubois filed suit against the Forest Service in the United States District Court for the District of Columbia challenging the Forest Service's permitting decision. In November 1994, the district court granted the Forest Service's motion under 28 U.S.C. 1404(a) to transfer the case to the District of New Hampshire. RESTORE intervened as a plaintiff in March 1995, and petitioner Loon Mountain Recreation Corporation intervened as a defendant in May 1995. Pet. App. 9a-10a; Gov't C.A. Br. 13-14.

On November 2, 1995, the district court ruled on the parties' cross-motions for summary judgment. Pet. App. 62a-102a. The court concluded that petitioner's proposed water transfers did not violate Sections 301(a) and 402(a) of the Clean Water Act (CWA), which prohibit the "discharge of any pollutant" into navigable waters of the United States from any "point source" without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. 1311(a), 1342(a). The court reasoned that because the pollutants contained in the East Branch water never leave the navigable waters of the United States, the pollutants are not added to Loon Pond within the meaning of the CWA. Pet. App. 67a-75a. The court

also rejected the contention that the Forest Service's environmental evaluation of petitioner's expanded ski resort violated the requirements of NEPA. The court found (1) that the public was given an adequate opportunity to comment on the environmental effects of the project described in Alternative 6 of the FEIS (Pet. App. 98a-102a); (2) that the FEIS adequately analyzed alternative means of meeting increased public demand for downhill skiing that would not have involved expansion of ski areas within the White Mountain National Forest (*id.* at 82a-83a); and (3) that the FEIS did not arbitrarily exclude from consideration alternative water storage mechanisms to reduce or eliminate drawdowns of Loon Pond (*id.* at 83a-84a).[1]

3. The court of appeals affirmed in part, reversed in part and remanded. Pet. App. 1a-59a.[2] The court reversed the district court's grant of summary judg-

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[1] The district court also concluded that RESTORE had standing to sue on all claims and that it thus was unnecessary to resolve whether Dubois had standing to sue (Pet. App. 63a n.1); that the Forest Service had not violated the Administrative Procedure Act, 5 U.S.C. 706(2)(A), by accepting New Hampshire's water quality certification under Section 401 of the CWA, 33 U.S.C. 1341 (Pet. App. 76a-78a); and that the Forest Service had complied with Executive Order No. 11,990, 42 Fed. Reg. 26,961 (1977), which addresses construction in wetlands (Pet. App. 95a-98a).

[2] The court of appeals concluded that Dubois had standing to sue (Pet. App. 11a-18a) and that the district court had jurisdiction over plaintiffs' claims (*id.* at 43a-44a). The court also rejected respondents' claims that the Forest Service improperly accepted the State's water quality certification (*id.* at 53a-58a) and that the Forest Service's special use permit violated Executive Order 11,990 (Pet. App. 39a-42a). Those rulings are not at issue before this Court.

ment with respect to respondents' claims under NEPA. The court concluded that "the Forest Service has not rigorously explored all reasonable alternatives, in particular the alternative that Loon Corp. be required to build artificial water storage ponds, instead of withdrawing water for snowmaking from, and discharging water into, an 'outstanding resource water' like Loon Pond." *Id.* at 27a. The court also concluded that the Forest Service's failure to prepare a supplemental EIS disclosing the scope and impacts of Alternative 6 "was arbitrary and capricious." *Id.* at 39a. The court explained that, "based on the record in this case, * * * Alternative 6 entails substantial changes from the previously proposed actions that are relevant to environmental concerns, and * * * the Forest Service did not present those changes to the public in its FEIS for review and comment." *Ibid.*

The court of appeals also reversed the district court's conclusion that the Forest Service could authorize petitioner's proposed expansion without the issuance of a NPDES permit under Section 402(a) of the CWA, 33 U.S.C. 1342(a). Observing that "there are at least some pollutants in the East Branch that do not exist naturally in Loon Pond" (Pet. App. 52a) and that "the transfer of water or its contents from the East Branch to Loon Pond would not occur naturally" (*id.* at 48a), the court rejected the district court's conclusion that the East Branch and Loon Pond are part of the same "singular entity" such that the transfer of water from East Branch into Loon Pond was not an "addition" of new pollutants into Loon Pond under the CWA. *Id.* at 47a. Accordingly, the court held that an NPDES permit is required for the discharges of water containing pollutants from the East Branch into Loon Pond. *Id.* at 53a. In re-

sponse to the Forest Service's petition for rehearing, the panel amended its opinion to make clear that petitioner, rather than the Forest Service, was required to apply for and obtain the NPDES permit. *Id.* at 61a.

ARGUMENT

Although the court of appeals rejected the government's contentions below, its decision is based upon the specific circumstances of this case and does not present questions of broader significance requiring resolution by this Court. Therefore, further review by this Court is not warranted.

1. a. Petitioner maintains (Pet. 8) that there is a conflict among the appellate courts on whether an NPDES permit is required "to withdraw and return water to the same water body without addition of any pollutants." Petitioner asserts (Pet. 8, 12) that the decision below reached that issue, citing a portion of the court of appeals' opinion that stated that "[t]he Eleventh Circuit has held that * * * a permit is required in order to move dredge materials by a point source *within the same* water body." Pet. App. 50a (citing *United States* v. *M.C.C. Of Florida, Inc.*, 772 F.2d 1501, 1506 (1985)).

The decision below, however, merely "h[e]ld that the Pemigewasset River and Loon Pond are two distinct 'waters of the United States,' and that the proposed transfer of water from one to the other constitutes an 'addition'" requiring an NPDES permit under the CWA. Pet. App. 53a. See also *ibid.* ("The Forest Service is simply wrong to analogize the present situation to a dam that merely accumulates the *same* water, or a pump storage facility that stores water from one source in a different place, as

distinguished from moving different water from one flowing water body into another stationary, colder body.") (citations omitted); *id.* at 48a ("the East Branch and Loon Pond are not the same body of water; the East Branch is indeed a source 'external' to Loon Pond"); *id.* at 51a ("defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an 'addition' of water from one of the 'waters of the United States' to another"). Thus, because the decision did not address a set of facts involving withdrawal and return of water to the same water body, this case would not be an appropriate vehicle for this Court's review of whether an NPDES permit would be required under those circumstances.

Petitioner acknowledges that the district court's decision "did not focus on the withdrawal and return of water to the same water body" and that the court of appeals' decision likewise "failed to fully analyze the issue," but petitioner nevertheless argues that the court of appeals' "decision turns on the idea that once water leaves the 'domain of nature' it becomes a discharge if later returned to its source, even if returned unchanged." Pet. 9-10. Petitioner is referring to the court of appeals' observation that water passing through petitioner's pipes on its way from the East Branch to Loon Pond "leaves the domain of nature" and "has lost its status as waters of the United States." Pet. App. 49a. The court of appeals made that statement, however, in the context of its holding that the transfer of water from the East Branch to Loon Pond requires an NPDES permit. *Id.* at 53a.

On remand, the district court raised the issue of whether the court of appeals' decision requires petitioner to obtain an NPDES permit for discharges of

water from the snowmaking system to the same water body from which the water was withdrawn, even if no new pollutants are added by virtue of the snowmaking system itself.[3] Petitioner argued to the district court that an NPDES permit is not required because "[t]he First Circuit held only that transfers of water from one body to another would constitute discharges under the Clean Water Act." April 9, 1997 Memorandum In Partial Opposition To Proposed Injunction at 3. On May 5, 1997, the district court entered an order requiring petitioner to apply for a permit for such discharges, but allowing such discharges on an interim basis.[4] If the First Circuit should hold in the future that an NPDES permit is required where water is restored to the same

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[3] Such discharges could occur, for example, when East Branch water passing through petitioner's snowmaking pipes later drains back into the East Branch. The parties dispute, however, whether petitioner's snowmaking pipes themselves add new pollutants, such as oil and grease, to the water. See Pet. App. 47a n.29.

[4] The United States supported the entry of the Court's May 5, 1997 order. During a hearing regarding that order—in response to a question from the district court as to whether an NPDES permit was required if water is taken from a water body, confined in a pipe without adding anything to the water, and released back into the same water body—government counsel stated: "Pursuant to the decision of the First Circuit, your Honor, I think that's correct in this situation." Apr. 11, 1997 Tr. 35. It is unclear whether "decision" refers to the First Circuit's actual holding or the particular language in its opinion quoted above. See Pet. App. 49a. As we explain in the text, however, the question addressed by the First Circuit involved a transfer of water from one body to another. We therefore do not believe that the First Circuit's specific holding in this case reaches the situation raised by the district court's question.

water body without the addition of new pollutants, there will be time enough for review by this Court. Accordingly, because the court of appeals has not yet definitively resolved the question of whether an NPDES permit is required for discharges into the same water body, review by this Court would be premature.

b. Petitioner also argues (Pet. 8) that there is a conflict among the courts of appeals on the question whether an NPDES permit is required "to transfer water without addition of any pollutants from one body of water of the United States to another via a point source." Petitioner fails to cite any appellate decision, however, that conflicts with the decision below. Indeed, the only case cited by petitioner (Pet. 14) that holds an NPDES permit is not required is a district court decision that involves not the discharge of pollutants from one water body into another, but the diversion of a stream. See *Bettis* v. *Town of Ontario*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992). Accordingly, there is no circuit conflict on the issue that warrants this Court's review.

2. Petitioner also argues (Pet. 16-19) that the court of appeals erred in faulting the Forest Service for not evaluating the use of artificial water storage ponds for snowmaking as an alternative to drawing water from Loon Pond. Although the federal respondents agree that that alternative lacks sufficient plausibility to merit detailed evaluation, the court of appeals' factbound conclusion to the contrary does not warrant further review by this Court.

Petitioner maintains (Pet. 16-18) that the decision below holds that agencies must not only evaluate reasonable suggestions of project alternatives but also all reasonable suggestions for mitigation even if the

agency has determined that the chosen means of mitigation will be satisfactory. The court of appeals' decision, however, simply applies the requirement under NEPA that an agency must explore all reasonable alternatives to a proposed action in order to permit a reasoned choice by the decision maker. See 40 C.F.R. 1502.14(a). Petitioner's proposed expansion contemplated an increase in water use to satisfy petitioner's increased snowmaking needs. Alternative means of water use are project alternatives, not mitigation measures to be employed once an alternative is selected. See 40 C.F.R. 1502.14(f). Accordingly, the decision below does not conflict with the decisions cited by petitioner that uphold the agency's evaluation of mitigation measures. See, *e.g.*, *City of Carmel-By-The-Sea* v. *United States Dep't of Transportation*, 95 F.3d 892, 908-909 (9th Cir. 1996); *Environmental Defense Fund* v. *Hoffman*, 566 F.2d 1060, 1071 (8th Cir. 1977).

3. Finally, petitioner argues (Pet. 20-24) that the court of appeals erred in concluding that the Forest Service was required to prepare a supplemental draft EIS to discuss Alternative 6. That factbound contention, however, does not warrant this Court's review. The court of appeals acknowledged that an agency must publish a supplemental draft EIS only if there are "substantial changes in the proposed action that are relevant to environmental concerns." Pet. App. 36a (quoting 40 C.F.R. 1502.9(c)(1)(i)). Both petitioner and the Forest Service argued to the court of appeals that the potential environmental effects of Alternative 6 fell within the range of effects of other alternatives that had previously been evaluated in the draft EIS, particularly Alternative 2. The court of appeals disagreed, however, concluding that altera-

tions in the configuration of development of petitioner's ski resort (which the court thought included areas that would have been undisturbed under the previously analyzed alternatives) and the increase in volume of water to be used for snowmaking were "substantial changes" that necessitated a supplemental draft EIS. Pet. App. 38a-39a. Although petitioner provides substantial reasons for believing that the court of appeals erred, the decision below was dependent on the court's view of the particular circumstances of the case and not on the application of legal principles significantly different from those applied by other courts of appeals. Thus, no further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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